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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

Supreme Court, U.S.
FILED
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No. 82-5319

RICHARD W. SIMON, Petitioner,

v.

STATE OF TENNESSEE, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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August 26, 1982

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

NO.

RICHARD W. SIMON,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
SUPREME COURT OF TENNESSEE

Petitioner, Richard W. Simon, prays that a writ of certiorari issue to review the judgment herein of the Supreme Court of the State of Tennessee entered in this case on June 21, 1982.

QUESTIONS PRESENTED FOR REVIEW

1. Was Richard Simon denied due process and his right to a fair trial by the trial court's failure to protect him from prejudicial pre-trial publicity?

A. Where virtually every potential juror had been exposed to extensive and pervasive pre-trial publiciity, including coverage of a racial demonstration on the weekend before the start of trial, was Simon denied a fair trial by the failure to grant a change of venue or a continuance?

B. Did the trial judge so limit voir dire as to deny Simon a fair trial by failing to exclude prejudicial jurors and by not allowing individual voir dire until the third day of trial and then only as to publicity, but not as to feelings on the death penalty or on racism?

C. Did the trial judge deny Simon a fair trial by failing to grant a mistrial or even to adequately inquire as to the effects of the discovery in the jury room of a highly prejudicial racist statement?

2. May the State of Tennessee execute Richard Simon where the trial court committed reversable error which deprived Simon of due process of law in excluding numerous jurors for cause based on their opposition to the death penalty, and in unduly restricting defense voir dire pertaining to the death penalty?

3. May the State of Tennessee execute Richard Simon where the Tennessee death penalty statute prohibits the trial judge from informing the jurors that the consequence of the inability to reach a unanimous verdict is the imposition of a life sentence thereby creating a substantial likelihood of an arbitrary death verdict contrary to the mandates of the Eighth and Fourteenth Amendments?

4. Did the trial court deny Simon due process of law by not allowing multiple defendants jointly indicted and tried to collaborate regarding the exercise of their peremptory challenges, thereby effectively reducing the number of peremptory challenges available to Simon resulting in the impaneling of a biased jury?

5. May the State of Tennessee execute Richard Simon where the trial court allowed the State to argue the deterrent effect of the death penalty, but refused to allow Simon to offer proof tending to show that the death penalty does not deter homicide, contrary to the mandates of the Eighth and Fourteenth Amendments?

6. Was Simon denied due process by the prosecutor's repeated reference to himself as the "people's representative", to the jury as "the conscience of the community", and to the defendant and his co-defendants as "a pack of wolves"?

OPINIONS BELOW

The opinion of the Supreme Court of Tennessee affirming petitioner's conviction and sentence is as yet unreported as is the order denying the petition to rehear. Copies of these decisions are attached hereto as Appendix 1-A and 1-B.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1257(3). The judgment of the Supreme Court of Tennessee was entered on June 1, 1982, and the Court's opinion on motion for rehearing was entered on June 28, 1982.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States reads:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The Eighth Amendment to the Constituion of the United States reads:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the Constitution of the United States reads in pertinent part:

> "***No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

The Tennessee death penalty statute is set forth in Appendix 2 to this petition.

STATEMENT OF THE CASE

Richard W. Simon was indicted and convicted for murder in the first degree with respect to the murder of Karen Sue Burkhart in Clarksville, Montgomery County, Tennessee. Mrs. Burkhart was killed by a single gunshot wound sometime around 11:30 p.m. on April 22, 1979 during the course of a robbery perpetrated at her home. Also indicted and convicted were Larry Simpson and Malcolmb Gray. Trial in this case occurred in the criminal court for Montgomery County, Tennessee where on April 2, 1980, a verdict of guilty of first degree murder was returned as to Simon, Gray and Simpson. At the punishment stage of the trial, which followed immediately thereafter, the State relied solely upon the felony murder as being the aggravating circumstance justifying the death penalty. Petitioner Simon did not testify, but did introduce several character witnesses who testified that he was 19 years old at the time of the crime and had no prior significant history of criminal conduct. The jury determined that the felony murder aggravating circumstance was not outweighed

by any mitigating circumstances, and on April 3, 1980, returned a verdict of death by electrocution as to petitioner Simon and life imprisonment as to his co-defendants Gray and Simpson.

The indictment in this case was returned on May 22, 1979. On June 8, 1979, upon agreement of counsel, the trial court granted the defendant's motion for a continuance, and ordered that the case would be set for trial at the next term of court. (Technical Record,hereafter T.R., 9). On September 28, 1979, the court set a trial date of January 7, 1980 and subsequently reset it to January 21, 1980. On December 8, 1980, the court changed the trial date to March 24, 1980 because of courtroom renovation. (T.R., 67). Petitioner filed a motion for continuance on March 19, 1980, which motion was denied by the trial court the next day. (T.R., 77, 105).

Numerous proceedings in this case involved the issue of venue. Petitioner's motion to dismiss the indictment against him because of pre-trial publicity surrounding this case was taken under advisement by the trial court on September 28, 1979 and was denied on December 20, 1979. (T.R., 17, 52, 65). His first motion for a change of venue based upon pre-trial publicity was filed with the court on August 20, 1979, and taken under advisement until the selection of a jury. The motion was renewed and again was taken under advisement. The trial court denied this motion on March 29, 1980. (T.R., 170).

Petitioner's motions and renewed motions for individual voir dire of perspective jurors were denied by the trial court on September 20 and 26, 1980. (T.R., 99-100,

105, 130). During the course of the trial, on April 3, 1980, petitioner requested a special charge to the jury concerning punishment and moved the court for a mistrial based upon the presence of a highly prejudicial racial note in the jury room. The trial court on the same day denied this request and motion. (T.R., 181-182).

Following his conviction and sentencing, Simon perfected an appeal to the Supreme Court of Tennessee which affirmed his conviction and sentence by opinion dated June 1, 1982. His motion for rehearing was denied on June 28, 1982. Simon is currently incarcerated in the maximum security unit of the Tennessee State Prison in Nashville, Tennessee with an execution date set for August 31, 1982.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER SIMON WAS DENIED DUE PROCESS AND HIS RIGHT TO A FAIR TRIAL BY THE TRIAL COURT'S FAILURE TO PROTECT HIM FROM PREJUDICIAL PRE-TRIAL PUBLICITY.

A. The Court Should Grant Certiorari to Determine Whether Simon Was Denied a Fair Trial by the Failure of the Trial Court to Grant a Change of Venue or a Continuance Where Virtually Every Potential Juror Had Been Exposed to Extensive and Pervasive Pre-Trial Publicity, Including Coverage of a Racial Demonstration on the Weekend Before the Start of Trial.

Early in the proceedings in this cause Simon moved for a change of venue pursuant to Rule 21 of the Tennessee Rules of Criminal Procedure. Supporting affidavits were filed by Simon, as well as copies of numerous newspaper articles pertaining to the case. (T.R., 28). Petitioner's motion was taken under advisement pending the actual voir dire in the case. (T.R., 104).

Petitioner's motion for change of venue was renewed at least twice prior to the actual completion of the voir dire, and again at the completion of the voir dire. Additional affidavits and exhibits were filed in support of his motion. (T.R., 83). At the conclusion of the voir dire, Simon's motion was overruled as being "moot". (Transcript of Evidence, hereafter T.E., 1553). The crime for which petitioner was charged received widespread news coverage in the local newspaper, the Clarksville Leaf Chronicle, as well as by the various local radio stations. Additionally, the case received news coverage from the television stations and daily newspapers in nearby Nashville, Tennessee, all of which are widely distributed in Clarksville, Montgomery County, Tennessee.

As the date of the trial approached, a second round of prejudicial publicity came in the form of demonstrations and marches by members of the Congress of Racial Equality. This group issued news releases pertaining to the Clarksville criminal justice system, petitioner and his co-defendants, and staged marches pertaining to the case, which also received widespread publicity on television and in local newspapers and on radio stations. Additionally, a highly publicized double murder involving robbery and torture occurred one week prior to the trial of this case, and it also received widespread publicity by all of the above-mentioned media. (T.R., 92).

On March 19, 1980, petitioner moved for a continuance in the trial because of the widespread and continuing publicity. The motion was denied the next day.

The degree of prejudicial publicity became apparent during the seven days of jury selection in this case.

Every potential juror had been exposed to potentially prejudicial publicity to at least some degree. Many potential jurors were familiar with the case down to the most minute detail.

Petitioner respectfully insists that the record overwhelmingly indicates that a change of venue should have been granted in this case. He exhausted his peremptory challenges, frequently renewed his motion for change of venue, and was repeatedly faced with potential jurors who were held competent by the trial court when saying only that they would "try" to be impartial, forcing petitioner to use a peremptory challenge until said challenges were exhausted.

The Tennessee Supreme Court, while admitting that there was considerable and extensive pre-trial publicity, found that the trial court had not abused its discretion in denying the motions for continuance and change of venue. (Appendix 1-A, p.13).

A fair trial by jury, as guaranteed by the federal constitution in the Sixth and Amendments, can be assured only when the minimum standards for ascertaining jurors' mental state have been followed properly. Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.E.2d 600 (1966); Rideau v. Louisana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963); Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). In this case, those standards were disregarded. Contrary to the mandates of these decisions, that an objective standard be applied in determining whether a given juror is actually able to be fair and impartial as required by the constitution, here the trial court improperly and naively accepted the jurors'

own statements of their ability to be fair and impartial, despite the publicity which they had been admittedly been exposed. In other words, the trial court accepted the jorors' subjective evaluations of their own mental workings, an indulgence forbidden by these above-cited cases.

In Sheppard v. Maxwell, supra., discussing the Court's earlier decision in Marshall v. United States, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959), this Court said:

> "[W]e did not consider dispositive the statement of each juror 'that he would not be influenced by the news articles, that he could decide the case only on the evidence of record, and that he felt no prejudice against petitioner as result of the articles.' "
> --384 U.S. at 352.

Similarily, commenting on the decision in Irvin v. Dowd, supra., wherein a state conviction in a capital case was overturned for the trial court's refusal to allow change of venue in the face of massive pre-trial publicity, this court in Sheppard v. Maxwell stated:

> "[E]ven though [in Irvin v. Dowd] each joror indicated that he could render an impartial verdict despite exposure to prejudicial newspaper articles, we set aside the conviction holding:
>
> > 'With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a waive of public passion . . .'" at 728, 6 L.Ed.2d at 759.
>
> --384 U.S. 351.

Where every single potential juror called for possible service in the trial of the charges against Simon had been exposed to prejudicial pre-trial publicity, with the result being that Simon was tried, convicted, and sen-

tenced to death by a jury of such persons, it cannot be said that Simon was not tried "in an atmosphere undisturbed by so huge a waive of public passion". The Tennessee Supreme Court in allowing his conviction and sentence to stand, has severely restricted the right to a fair trial before an impartial jury and to due process guaranteed to citizens by the Sixth and Fourteenth Amendments to the United States Constitution as interpreted by this court in Sheppard v. Maxwell, supra.

B. The Court Should Grant Certiorari to Determine Whether the Trial Judge so Limited Voir Dire as to Deny Simon a Fair Trial, By Failing to Exclude Prejudiced Jurors and Not Allowing Individual Sequestered Voir Dire Until the Third Day of Trial, and Then Only As to The Issue of Publicity.

This Court recognized in Sheppard v. Maxwell, supra., that a trial court has an obligation to insure that a defendant in a highly publicized case is not denied his right to a fair trial before an impartial jury because of prejudicial publicity. 384 U.S. at 358-9. Here, the trial court failed to meet this obligation by refusing to allow individual sequestered voir dire and by failing to excuse for cause those prospective jurors who could not state unequivocally that they could disregard any prior knowledge or feelings that they had about the case based upon pre-trial publicity. In spite of the extensive publicity generated by this crime and by events leading up to trial, including public demonstrations by a civil rights activist organization, the trial court denied petitioner's motion for individual sequestered voir dire. Instead, the trial court improperly relied on the jurors' responses given in the presence of one another. (See also, United States v. Accardo, 298 F.2d 133, 136 (7th Cir. 1962)regarding the necessity of individual questioning). The

questioning of one juror may infect the fairness of another, and group dynamics may prevent a juror from admitting a prejudice denied by his peer in his presence.

Here, twelve prospective jurors were seated and examined as a group. The remaining prospective jurors remained outside of the courtroom. All the questions and answers were heard by all twelve jurors. This procedure placed defense counsel in the position of being unable to fully explore the extent of exposure to publicity in any single juror, as an individual juror in answering questions on voir dire could easily "pollute" the remaining eleven prospective jurors with prejudicial answers concerning publicity. This difficulty was heightened by the fact that every single prospective juror indicated some degree of exposure to pre-trial publicity.

Evidently the trial court recognized the degree of exposure to publicity, and during the third day of jury selection, began to allow individual sequestered examination of potential jurors only as to the issue of exposure to publicity. However, the court refused to allow such individual questioning of prospective jurors previously examined.

Several prospective jurors in this case should have been excused for cause because of their exposure to publicity, but were not so excused causing the use of peremptory challenges until such challenges were exhausted. In a capital case, any use of a peremptory challenge where it should not have been required cannot be harmless error as that peremptory challenge would have been available later in the proceedings for the defendant's use. For example, prospective juror I. J. Harper was found to be

competent by the trial court in spite of his extensive detailed knowledge of the facts of the case based upon his continuous exposure to pre-trial publicity. (T.E., 1008-84). Petitioner unsuccessfully challenged this prospective juror for cause, but the challenge was overruled, and Mr. Harper was removed by the use of a peremptory challenge. The Tennessee Supreme Court found no abuse of discretion in the way the trial court had conducted voir dire. (Appendix 1-A, p.14-15).

In examining the qualifications of prospective jurors who have difficulty voicing impartiality, petitioner submits that the trial court should have excused those who, even after considerable "rehabilitation", said only that they would "try" to lay aside their opinions, but expressed no self-confidence in their ability to do so. Petitioner exhausted his peremptory challenges and unsuccessfully challenged several jurors who could not state unequivocally that they would be impartial. In light of the death penalty rendered, these errors cannot be held to be harmless.

C. The Court Should Grant Certiorari To Determine Whether Simon Was Denied His Rights To a Fair Trial and To Due Process By the Trial Court's Failure To Declare a Mistrial Following the Discovery in the Jury Room of a Highly Prejudicial Racial Statement.

This case involved the trial of three young black men accused of murdering a middle-aged white woman during the perpetration of a robbery at her home late on a Sunday evening. The case received extensive pre-trial publicity. On the weekend before the trial, there was a highly publicized demonstration by an activist civil rights group, CORE. All of the potential jurors had been exposed to some pre-trial publicity, with many of them knowing the race of the defendants and victim, and having heard about the civil

rights demonstration. Motions by petitioner for continuance and for a change of venue were repeatedly denied.

At approximately 5:00 p.m. on April 2, 1980, the guilt/innocence phase of the trial was concluded with the return of a verdict of guilty of first degree murder as to petitioner and his two co-defendants. The sentencing phase began immediately with opening statements and the presentation of some defense evidence that evening. When court was opened on the morning of April 3, 1980, it was reported to the court that the jury had turned over to one of its custodians the following note found on a legal pad in the jury deliberation room:

> "The Burkheart [sic] case is over. The boy's got life. We were trying to give them death. KKK."

The note was apparently read and discussed by the members of the jury. (T.E., 2445). Although two court officers were questioned, it was not discovered how the note had gotten into the jury room or how long it had been there.

The only inquiry made of members of the jury was as follows:

> "THE COURT: Be seated, will you please, members of the jury. Now, members of the jury panel, here this morning the Court has heard some testimony about your having found a --or a tablet having been found in the jury room. Some of you may have read what was on it. I instruct all of you that this is an extraneous matter and that you should put no significance to it whatsoever. Whatever you may have read, whatever you may have said about it, the Court instructs you do not pay it any attention in making your decision about the punishment in this case.
>
> GENERAL BOBO: Your Honor, do you want to inquire as to whether or not

any of them feel that they are going to be bothered with this?

THE COURT: I will ask if any of you, after having read this or if you did read it, is it going to have any effect on your making your decision about the punishment?

(WHEREUPON, the jury replied with collective negative responses.)

THE COURT: I show negative. All of you say no. Is that right? All right." (T.E., 2453-4).

Petitioner's motion for a mistrial was denied. Following the presentation of additional defense evidence and closing arguments and charge, the jury began its deliberations at approximately 11:00 that morning. At approximately 5:00 that afternoon, the jury returned its verdict sentencing petitioner to death by electrocution, and his two co-defendants to life imprisonment.

The Tennessee Supreme Court dealt with this issue in the following manner:

> "After the guilt phase of the trial and during the sentencing hearing, an anonymous note was found on the back of a legal pad in the jury room. The trial judge questioned the jurors concerning this note. He ascertained that none of them had any knowledge about it and that it would have no influence upon their decision. Under the circumstances, we are of the opinion that the trial judge was not required to grant a mistrial, and that the procedure which he followed was appropriate." (Appendix 1-A, p.12)

The trial judge did not question the jurors about the note,and he did not ascertain that none of them had any knowledge about it. In fact, the only proof was that the jurors had read and discussed the note. Rather than attempting to determine objectively whether, based on all known to him, he, the judge, thought it was or was not possible for

jurors to be fair and impartial, the court improperly and in denigration of due process, allowed his decision on this issue to be based entirely on the highly improbable, purely subjective statements of the jurors. Further, what limited inquiry the trial judge made was ineffective because it was conducted of the jury as a group rather than individually. Given the possibility that the note could have been authored by a member of the jury, or that some other person had access to a member of the jury, such an approach is not acceptable. Given the extensive amount of pre-trial publicity and the serious racial overtones of the case, the trial court should, at the very least, have examined each juror individually out of the presence of the other jurors in an attempt to determine the source of the note and the extent of prejudice. This was not done. The Tennessee Supreme Court, presented with the problem, conducted only a cursory examination and based its conclusion upon a clearly erroneous reading of the facts. The due process guarantees of the Fourteenth Amendment mandate that Simon receive better treatment, particularly where his life is at stake. Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). The trial court and the Tennessee Supreme Court did not fulfill their obligation to see that Simon received the fair trial before an impartial jury, uninfluenced by extrajudicial matter to which he was entitled under the Sixth Amendment to the United States Constitution:

> "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether in private talk or public print."
>
> --Patterson v. Colorado, 205 U.S.454,

462 27 S.Ct. 556, 51 L.Ed. 879 (1907).

The actions of the trial court and of the Tennessee Supreme Court are contrary to the mandates of this Court as stated in Sheppard v. Maxwell, supra. at 384 U.S. 362-3:

> "Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances.*** But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity.*** If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered."

II. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER TENNESSEE MAY EXECUTE SIMON CONSISTENT WITH THE SIXTH AND FOURTEENTH AMENDMENTS WHERE NUMEROUS JURORS WERE EXCLUDED BY THE COURT BASED UPON THEIR OPPOSITION TO THE DEATH PENALTY AND WHERE THE TRIAL COURT UNDULY RESTRICTED THE DEFENSE VOIR DIRE PERTAINING TO THE DEATH PENALTY.

In Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) this Court held that a state may not constitutionally execute a death sentence imposed by a jury from which were excluded all those who revealed during voir dire examination that they had conscientious scruples against, or were otherwise opposed to, capital punishment. The trial court here allowed numerous challenges for cause by the State of jurors who expressed such sentiments, without allowing the defense an adequate oppor-

tunity on further questioning, to demonstrate that those potential jurors could nonetheless follow the court's instructions in their oaths and be fair and impartial both to the State and the defendant.

In Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980) this Court held that a state may not execute a sentence of death imposed by a jury from which had been excluded all prospective jurors who were unwilling or unable to swear that the mandatory penalty of death or life imprisonment (the same possible alternatives as in this case) would not effect their deliberations on any factual issues, as such exclusion violated the Sixth and Fourteenth Amendments.

Witherspoon, was explained thus by this Court in Adams:

> ". . .Witherspoon is not a ground for challenging any prospective juror. It is rather a limitation on the State's power to exclude: If prospective jurors are barred from jury service because of their views about capital punishment on "any broader basis" than inability to follow the law or abide by their oaths, the death sentence cannot be carried out." --448 U.S. at 48.

Here, the trial court not only improperly excused several prospective jurors because of their expressed opposition to the death penalty, but also improperly refused to allow attorneys for the defendants to question these prospective jurors about their qualifications.

The voir dire of one prospective juror, a Mrs. Halford, shows that not only did she never unequivocally state her opposition to the death penalty in the terms required by Witherspoon, but that the court prevented attorneys for the defendants from examining her in that regard:

"GENERAL BOBO:..If the Judge should instruct you that that is the law, that such conduct does constitute murder in the first degree, would you take issue or quarrel with that doctrine of the law?

MRS. HALFORD: I am against, you know, capital punishment.

GENERAL BOBO: The reason--I will be asking you about that, ma'am. First degree murder, as you all know, the defendants--the State is convinced that you will make a finding of murder in the first degree, if we were not, we would not be up here taking all of this time qualifying a jury on capital punishment. Since murder in the first degree--the law in the State of Tennessee provides that there are two punishments to be considered if you find them guilty of murder in the first degree. There are two punishments that can be considered, and that is --life imprisonment or death. I am going to start out with you, Mr. Leavell, do you have any conscientious or moral scruples that provide for a blanket opposition to capital punishment?

***

[Examination of other jurors]

GENERAL BOBO: . . .And now, Mrs. Halford, feel free like you did earlier--you volunteered your statement. There is no problem with that. Mrs. Halford you stated that you are against capital punishment. Let me ask you the question this way. Is that a religious or moral opposition you have overall as to capital punishment?

MRS. HALFORD: Religious.

GENERAL BOBO: At this point you have not heard any of the proof and naturally none of the other jurors have and this is not the proof in the case. You know nothing about the three defendants, you know nothing about the proof in the case, and what you have read in the paper you can't consider, but can you say at this point that regardless of the facts in the case, you are--you said religiously committed--

MR. CLOUD [attorney for co-defendant Gray]: Your Honor, they are instructed--that is not to say anything about religion or anything concerning that--I think you have hit us on that--he can't hit on the same thing we can't hit on--and he is asking about a religious belief against capital punishment--he can ask the question just like--

GENERAL BOBO: I will change--I will omit the reference to religion--in all fairness, I don't want to go into their religious affiliations, I will just say--can you say at this point that regardless of the facts of this case, that you are committed in your own mind--fixed in your own mind to vote against the death penalty in case?

MRS. HALFORD: Yes.

GENERAL BOBO: Your answer is yes. Did you understand my question?

MRS. HALFORD: I think so.

GENERAL BOBO: You--

COURT: I think--excuse me--I think she has indicated her attitude on this--

MRS. CLOUD: Your Honor, would we have the right to ask questions--

COURT: No, we are not going to go through the rehabilitation program.

MR. CLOUD: Under Witherspoon v. United States, Your Honor, I would like to note for the record we have--

COURT: You look at Rule 24--

MR. WEDEMEYER [trial counsel for petitioner]: Excuse me, Your Honor. I want to make sure this is perfectly clear--is it Your Honor's ruling that we are not going to be allowed to ask any rehabilitating questions of this witness?

COURT: I think, Mr. Wedemeyer, when it clearly appears that somebody is against the death penalty, then they are not qualified and the Commission

said here that they disapprove the procedure of rehabilitating the prospective juror.

MR. WEDEMEYER: Your Honor, she hasn't been explained about aggravation and mitigation or anything like that.

COURT: She has stated unequivocally that she is against it, so you are excused, Mrs. Halford.

MR. CLOUD: On the record now--is it on the record now that you are not allowing us to ask any questions concerning this--to this witness--

COURT: What I said--

MR. CLOUD: --about the death penalty at all?

COURT: Yes, this witness. What I said, Mr. Cloud, what I said was--that if it clearly appears that a person was against the death penalty, such as she has just stated that she couldn't vote it in any case, then I am going to excuse her, instead of going through the rehabilitation questions that you and Mr. Wedemeyer have previously asked.

MR. CLOUD: Note our exceptions not being allowed to question this witness, Your Honor.

COURT: All right, you are excused, Mrs. Halford."(T.E., 525-9).

Several other prospective jurors were excused for cause without defense counsel being allowed to conduct an examination: Oldham (T.E., 562-3), Wiley (T.E., 950-6), Cardillo (T.E., 960-1), Parham (T.E., 1142-3), Bowman (T.E., 1321-2), Rogers (T.E., 1323-4), and Talley (T.E., 1483-6). Contrast this with the examination of prospective juror Felton C. Davis, who appeared at first not to be qualified, but upon further examination by counsel for the petitioner, the State's challenge for cause was withdrawn. (T.E., 150-6), and the examination of prospective juror Murray T. Ogle, who was still found

to be unqualified to serve after examination by counsel for petitioner (T.E., 395-402). The trial court and the Tennessee Supreme Court could have only speculated as to whether jurors excused for cause before examination by defense counsel would have been rehabilitated or not. Such speculation on a matter of such importance to one whose life is stake is not consistent with the mandates of the Sixth and Fourteenth Amendments as interpreted by this Court in Witherspoon and Adams.

III. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE TENNESSEE DEATH PENALTY STATUTE ALLOWS THE IMPOSITION OF THE DEATH PENALTY IN AN ARBITRARY MANNER CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS BY PROHIBITING THE TRIAL JUDGE FROM INFORMING THE JURORS THAT THE CONSEQUENCE OF THEIR INABILITY TO REACH A UNANIMOUS VERDICT ON PUNISHMENT IS THE IMPOSITION OF A LIFE SENTENCE.

The Tennessee death penalty statute provides a bifurcated trial where there is a sentencing phase only if the defendant is first convicted of first degree murder. Upon such a finding of guilt, the jury then receives additional evidence relating to punishment and must decide whether to impose death by electrocution or life imprisonment. However, the jury is not informed as to the consequences of its failure to reach a verdict on sentencing. T.C.A. §39-2404(h) reads as follows:

> "(h) If the jury cannot ultimately agree as to punishment, the judge shall dismiss the jury and the judge shall impose a sentence of life imprisonment. The judge shall not instruct the jury, nor shall the attorneys be permitted to comment at any time to the jury, on the effect of the jury's failure to agree on a punishment."

In the instant case the trial judge complied with the above statute and, thus, the jury had no instruc-

tion regarding the consequences of their inability to reach a unanimous verdict. This omission--statutorily dictated--created a substantial likelihood that the jury would render an arbitrary verdict.

The charge, as it was given, implies to the jury that only a unanimous verdict can lead to a sentence being imposed, whether it be life imprisonment or death. This is not a correct implication because failure to agree does result in a sentence being imposed--life imprisonment. Failure to completely and properly instruct the jury on this crucial aspect of the law leaves jurors free to speculate that their inability to reach a verdict will result in either a completely new trial, a new trial on the sentencing aspect or a sentence of less than life imprisonment.

This risk--that a juror who is holding out may vote for the death penalty out of a desire to reach unanimity rather than from an individual and conscientious assessment of the evidence--"is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." Lockett v. Ohio, 438 U.S. 586, 605, 57 L.Ed.2d 973, 900 (1978).

The issue raised herein was addressed by the Supreme Court of Lousiana in a recent decision, Louisiana v. Williams, 392 So.2d 619 (1980). Although the court held with the state in its initial decision, upon rehearing, it reversed its original position, affirmed the conviction but reversed the sentence, remanding for a retrial on the issue of penalty:

> "The trial judge did not inform the jury either in his general

or additional instructions that its inability unanimously to agree on a recommendation would require the court to impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence. The issue presented is whether the jurors in a capital sentence hearing must be informed by the trial judge that the defendant will be sentenced to life imprisonment without benefit of probation, parole or suspension of sentence, if they are unable to be unanimous on a recommendation.

The constitutional prohibition against cruel, unusual or excessive punishment mandates that 'where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.' Gregg v. Georgia, 428 U.S. 153, 189, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). See also, Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 345 (1972). The death penalty may not be imposed under sentencing procedures that create a substantial risk that it will be inflicted in an arbitrary and capricious manner. Gregg v. Georgia, supra, 428 U.S. at 153, 96 S.Ct. at 2909, 49 L.Ed.2d at 859. Moreover, in a case in which the penalty is determined by the jury rather than by the judge, the jurors, in order to perform their function as a rational link between contemporary values and the penal system, Witherspoon v. Illinois, 391 U.S. at 419 n. 15, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), must be fully informed of the consequences of their verdicts, including the penalities involved. State v. Washington, 367 So.2d 4 (La.1978); State v.Milby, 345 So.2d 18 (La.1977); see State v. Prater, 337 So.2d 1107, 1109, 1110 (La. 1976) (Tate, J., concurring) (Calogero, J., dissenting).

In the present case the jurors were not fully informed of the consequences of their votes and the penalties which could result in each eventuality. They were not told that, by their failure to decide unanimously, they would in fact decide that the court

must impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence. Instead, the members of the sentencing body were left free to speculate as to what the outcome would be in the event there was not unanimity. Under these circumstances, individual jurors could rationally surmise that in the event of disagreement a new sentencing hearing, and perhaps a new trial, before another jury would be required.

Such a false impression reasonably may have swayed a juror to join the majority, rather than hold to his honest convictions, in order to avoid forcing the parties, witnesses and court officials to undergo additional proceedings. Consequently, by allowing the jurors to remain ignorant of the true consequence of their failure to decide unanimously upon a recommendation, the trial court failed to suitably direct and limit the jury's discretion so as to minimize the risk of arbitrary and capricious action. The death penalty was imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.

The penalty of death is qualitatively different from a sentence of imprisonment. Death, in its finality, differs more from life imprisonment than a 100-year prison terms differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Gardner v. Florida, 340 U.S. 349, 362, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) (White, J., concurring); Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976).

The effect of the error here involved must be held to have been prejudicial. If only one of the twelve jurors was swayed by the failure to inform him fully of the consequence of his sentence recommendation, then, in the absence of that error, the death penalty would not have been imposed.

> The judgment convicting the defendant of first degree murder is affirmed. His sentence of death is reversed, and the cause is remanded for a re-trial on the issue of penalty."
>
> --392 So.2d at 634-5.

The decision of the Tennessee Supreme Court upholding validity of this portion of the statute is contrary to the mandates of the Eighth and Fourteenth Amendments as interpreted by this Court in Lockett v. Ohio, supra and Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980).

IV. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER SIMON WAS DENIED A FAIR TRIAL AND DUE PROCESS OF LAW BY THE IMPROPER REDUCTION OF THE NUMBER OF PEREMPTORY CHALLENGES AVAILABLE TO HIM.

Tennessee Law provides that a defendant in a capital case is entitled to fifteen peremptory challenges. The law further provides that these challenges are to be exercised in such a manner so that the jury does not know which party is exercising the challenge. In this case, the trial court refused to allow Simon and his co-defendants to collaborate with each other prior to the exercise of peremptory challenges, and instructed them that they were in no manner to make known to each other how they intended to exercise their peremptory challenges. The Tennessee Supreme Court found this to be erroneous and found that as a result of this procedure, petitioner lost the use of several peremptory challenges and had indicated an intention to challenge at least one other juror after his fifteen challenges were exhausted. However, the Tennessee Supreme Court found this error to be harmless since, in its opinion, the jury that was finally seclected for this case was fair and impartial, and that those jurors who set were legally qualified as jurors.

If the only purpose of peremptory challenges is to assist the defendant in obtaining a legally qualified jury, then there is no purpose for peremptory challenges as a criminal defendant would simply challenge for cause any potential juror that he thought to be legally unqualified. In that event, the trial court would rule on the challenge and if aggrieved by the trial court ruling, the defendant could raise the issue on appeal. Clearly peremptory challenges as a statutory right granted to a criminal defendant in Tennessee were meant to be used with unbridaled discretion, for any reason chosen by the defendant or his attorney, or even for no reason at all.

Many facts pertaining to potential jurors are not ascertainable by simply reviewing the record of the voir dire. Dress, facial expressions, tone of voice, hesitancy to answer, and numerous other matters come to light during the process of voir dire as all trial lawyers are aware. These factors often become a part of the decision-making process in the intelligent use of peremptory challenges.

The intelligent and full use of peremptory challenges by defendant in a capital case, although perhaps not a constitutional guarantee, is a statutory right, the abridgement of which cannot be harmless error. The defendant in a capital case is entitled by the United States Constitution to a fair trial before an impartial jury, and to due process of law. The erroneous reduction of even one peremptory challenge, particularly where the jury seated render the death penalty, it is not harmless error. This Court recognized this in Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965):

> "Although '[t]here is nothing in the Constitution of the United States which requires the Congress [or the States] grant peremptory challenges', . . .nonetheless the challenge is 'one of the most important of the rights secured to the accused,'. . . . The denial or impairment of the right is reversible error without a showing of prejudice,. . .'for it is, as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose.'"
>
> --380 U.S. at 219

The effect of the holding of the Tennessee Supreme Court on this point is that defendants in capital cases in the future will have the full use of their fifteen peremptory challenges, but not Simon. Furthermore, if an aggrieved defendant must show prejudice* resulting from the limitation of his peremptory challenges, contrary to this Court's holding in Swain, then the erroneous limitation of peremptory challenges would always be harmless unless it was shown that an unqualified juror sat in which case the proper remedy would be to challenge for cause and to obtain relief for an improper ruling on that challenge. In either event, the result as to Simon does not meet that standard of due process to which an accused in a capital case is entitled by the Fourteenth Amendment. Gardner v. Florida, supra.

V. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE STATE OF TENNESSEE MAY EXECUTE RICHARD SIMON CONSISTENT WITH THE MANDATES OF THE EIGHTH AND FOURTEENTH AMENDMENTS WHERE THE TRIAL COURT ALLOWED THE STATE TO ARGUE THE DETERRENT EFFECT OF THE DEATH PENALTY, BUT REFUSED TO ALLOW SIMON TO OFFER PROOF TENDING TO SHOW THAT THE DEATH PENALTY DOES NOT DETER HOMICIDE.

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* It is inconceivable what more prejudice could be shown than that Simon attempted to exercise a peremptory challenge after the erroneous exhaustion of the allowed number, and that the jury which was impaneled returned a verdict of guilty and a sentence of death for him.

Following the return of the verdict of guilty of first degree murder and at the beginning of the sentencing phase of the trial, Simon sought a determination as to the admissibility of the testimony of a local university professor who would testify that statistical studies show that the death penalty is not a deterrent to crime. The court ruled that such testimony would be inadmissible as being irrelevant. (T.E., 2372-4).

Nevertheless, on at least three occasions during an argument which takes up only 10 pages of transcript, the prosecutor argued deterrence: that the jury should send a message to the criminal element in the community by returning a verdict of death in this case:

> "Like I said, the truest representatives of the community that are now vested with the authority and the power to strike a blow against those who will terrorize or have terrorized and victimized one of your fellow citizens. It's the one time, I suppose, that you are going to be in a position to really do something against those forces that I spoke of earlier in argument before, those forces that have made locks on doors as much of an important part of a household as the door is itself. (T.E., 2483-4)
>
> * * *
>
> Ladies and gentlemen, their possibility of death, the punishment they so richly deserve, that's merely a hazard of their trade that they took upon that April the 22nd. By golly, getting caught and getting what you deserve, by golly, that's just a risk you assume when you arm yourself with those guns and go out on the prowl throughout Clarksville. That's what you can say with your verdict. When you go out on the prowl and choose any home you want to, whoever's it may be that's one of our good citizens, to decide to blow apart, by golly, capital punishment and death is what you are just assuming the risk of,

> Mr. Gray, Mr. Simon, and Mr. Simpson. You chose it. You are going to live with it until they do inflict the punishment that we are going to vote for." (T.E., 2487-8).
>
> * * *
>
> Your verdict should say that these three, or anybody else who is so inclined to rob and prey upon others, your verdict should say: Malcolmb Gray, Richard Weldon Simon, and Larry Simpson, and anybody else that is so inclined, when you come to our community in Clarksville and Montgomery County, when you choose to do the acts that you do, when you choose to conduct yourself in the manner that you have and did on the night of the 22nd, then you are going to get just what you asked for. And what you asked for was no more mercy than you showed the Burkhart family, and that is death. You are going to get it. That's what your verdict can say and should say and would be truly reflective of the needs of the community." (T.E., 2489).

The last quoted paragraph was at the conclusion of the prosecutor's argument. Deterrence was a major theme running throughout this argument as evidenced from the above quotes. It offends the fundamental fairness of the due process guarantee of the Fourteenth Amendment to allow the State to argue deterrence after having refused to allow the defendant to offer proof to the jury which would tend to show that the punishment sought was in fact not a deterrent. Such action certainly does not meet the higher standard of due process to which Simon was entitled while on trial for his life. Gardner v. Florida, supra.

The Tennessee Supreme Court held that the trial court had properly excluded Simon's evidence relating to deterrence, relying upon its prior decision in State v. Johnson, 632 S.W.2d 542 (Tenn. 1982). However, Simon did not raise, nor did the Tennessee Court decide the question of whether the exclusion of that evidence combined

with the State's argument on deterrence denied the petitioner due process. However, this combination of events was so fraught with potential prejudicial to Simon as evidenced by the return of verdict of death in his case as to require this Court to notice that error notwithstanding petitioner's failure to raise the issue before the Tennessee Supreme Court. Rogers v. United States, 422 U.S. 35, 41, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975).

VI. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER SIMON WAS DENIED DUE PROCESS AND A FAIR TRIAL BY THE PROSECUTOR'S REPEATED REFERENCE TO HIMSELF AS THE PEOPLE'S REPRESENTATIVE, TO THE JURY AS THE CONSCIENCE OF THE COMMUNITY, AND TO THE DEFENDANT AND HIS CO-DEFENDANTS AS "A PACK OF WOLVES".

Throughout the course of the trial the prosecutor sought to align himself with the jury by characterizing himself as the people's representative or the people's attorney, and characterizing the jury as the conscience of the community. He referred to himself as "the people's representative" or some similar appellation some 48 different times during the jury selection process. Defense counsel objected to this very early in the proceedings, but the objection was overruled. (T.E., 9). The prosecutor culminated this effort with the following statement made during his argument at the punishment phase of the trial:

> "I want it made just so perfectly clear--I know you've already had the admonishments of the Court. I represent the people, the community, no interest. And so do you. You represent the community. That's what you do. I just want to make that, to start out with, very clear. You are simply--and I don't mean simply, that's almost talking down to you. You are representatives of the community, not of any--any segments of the community

> that stand for anything in particular. You are just good, decent citizens of the community and that's what you represent, the good decency of our community and not any interest of any specialized groups. And I am a representative of the people likewise." (T.E., 2479-80).

In contrast to this, the prosecutor characterized the defendants as "a small segment of our community that is capable of bringing so much grief upon one of our fellow citizens" (T.E., 2293) and going to say:

> "But when they choose, ladies and gentlemen, as they did choose, to prey upon other good law-abiding, hard-working, pillars of our community type of citizens no different than either one of you, then we find no humor. And I don't see any humor along the front row of the courtroom. I don't think there is any humor to be found anywhere in the household of the--Karen Sue Burkhart's family.
>
> And you know the main reason I know there's nothing humorous or nothing sympathetic that you can find, ladies and gentlemen? Because you know that when you, ladies and gentlemen, leave the custody of the sheriff's department, as you have been in for the last ten days or nine days, however many it's been--I think eight days, really--'cause you know when you're not in the custody of our bailiff anymore, you're going right back to that community of other law-abiding citizens just like yourself. And I guess, hearing all that you've heard over the last two days, you might have been worrying about the fact that you were being kept up here and not at home with your families, because I had to show you how a segment of our society, how their minds operate. And that doesn't strike any note of humor or sympathy for the defendants.
>
> The only note that what I've shown you should strike is a note of absolute and total terror. Place

> yourselves, with your good common reasoning, in the shoes of Paul Burkhart or any other member of our community that finds themself suddenly one night at 11:00 o'clock, someone banging on your door, and they meet you at the door with a pistol. They come barging into your household and cut down one of the members of that household. And think, I'm going back into that community of which Paul Burkhart is a part. Absolute and total terror, I suppose, that's the worst word I can use. The horror and the terror, the grief and the hardships on the family of Paul Burkhart. Because you know when you do go back out there, Wade Bobo, in his presentation of proof, all he did was show you four or five or six in one little group and you know there's more where that comes from. There are more little segments like that." (T.E., 2297-8).

Finally, prosecutor concluded this characterization in the following manner:

> "Those are three adults seated over there, and just note how they acted. Almost, it appears, like a pack of wolves. When someone, a young wolf, comes up with an idea, a little 16-year-old comes up with this idea, 'Hey, there's the Burkhart household. They've got lots of money in a shoe box.' They're just like a pack of wolves--
>
> MR. WEDEMEYER: Your Honor--
>
> GENERAL BOBO: --waiting for someone to throw out a bone or suggest a meal.
>
> MR. WEDEMEYER: I hate to interrupt during argument, but I don't think it's proper to refer to these people as a pack of wolves. I think that's prejudicial and it's not proper, and Mr. Bobo knows it.
>
> THE COURT: Well, the Court will sustain the objection. Mr. Bobo, don't refer to the defendants in such manner." (T.E., 2299).

In responding to complaints about this line of argument, the Tennessee Supreme Court stated that the trial

court had sustained an objection to one derogatory comment and that the other comments of the prosecutor were within the bounds of propriety. (Appendix 1-A, p.8). These comments may be within the bounds of propriety of the Tennessee Supreme Court, but they do not meet the standards of due process of this Court as established in Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

This whole line of argument of the prosecutor was not the result of improvisation during the passion of argument. It was obviously carefully constructed in advance. The comments were not ambiguous or unintentional. See Donnelly v. De Christoforo, 416 U.S. 637, 647, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). On the contrary, this line of argument was intended to convey to the jury the clear statement that the jury and the prosecutor as part of a team of good people had an obligation to convict and punish bad people: the defendants. This denial of Simon's basic right to a fair trial and to due process, so summarily affirmed by the Tennessee Supreme Court is incompatible with the decisions of this Court in Berger and Donnelly and must be remedied.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

Henry A. Martin, Attorney for
Richard W. Simon
P. O. Box 3190
Nashville, TN 37219
(615) 255-0441

RECEIVED
AUG 30 1982
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

Supreme Court, U.S.
FILED
AUG 26 1982
Alexander L. Stevas, Clerk

NO: 82-5319

RICHARD W. SIMON,

Petitioner,

STATE OF TENNESSEE,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner Richard W. Simon respectfully moves, pursuant to Rule 46 of the rules of this Court, for leave to file his Petition for Writ of Certiorari and proceed thereafter in forma pauperis. The petitioner was declared indigent, afforded appointed counsel, and allowed to proceed in forma pauperis in the proceedings before the Criminal Court in Mongtomery County, Tennessee and the Supreme Court of Tennessee. His Affidavit in the form prescribed in Federal Rules of Appellate Procedure, Form 4, together with his Petition for Writ of Certiorari to the Supreme Court of Tennessee, are respectfully filed herewith.

Respectfully submitted,

Henry A. Martin, Attorney for
Richard W. Simon
P. O. Box 3190
Nashville, TN 37219
(615) 255-0441

CERTIFICATE OF SERVICE

I certify that I am a member of the Bar of this Court and that on behalf of the petitioner herein, I have served a copy of this Motion for Leave to Proceed In Forma Pauperis upon the State of Tennessee by depositing a copy of same in the United States Mail, first-class postage prepaid, addressed to Hon. William Leech, Attorney General, 450 James Robertson Parkway, Nashville, TN 37219, on this 26 day of August, 1982.

Henry Martin

RECEIVED
AUG 30 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

NO.

RICHARD W. SIMON,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

AFFIDAVIT IN SUPPORT OF
MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF TENNESSEE)
)
COUNTY OF DAVIDSON)

I, RICHARD W. SIMON, being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my Motion to Proceed In Forma Pauperis in the filing of a Petition for Writ of Certiorari to the Supreme Court of Tennessee, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe that I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of prosecuting this petition are true:

1. Are you presently employed?

ANSWER: No.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other source?

ANSWER: No.

3. Do you own any cash or checking or savings account?

ANSWER: No.

4. Do you own any real estate, stock, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and cothing)?

ANSWER: No.

5. List the persons who dependent upon you for support and state your relationship to those persons.

ANSWER: None.

I have been incarcerated since my trial in this case in March, 1980.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Richard W. Simon

RICHARD W. SIMON

Subscribed and sworn to before me
this 26 day of August, 1982.

Mary K. Watts

NOTARY PUBLIC

My Commission Expires: 10-20-85

LET THE APPLICANT PROCEED WITHOUT PREPAYMENT OF COSTS OR FEES OR THE NECESSITY OF GIVING SECURITY THEREFOR.

_____

JUDGMENT ENTERED THIS
DATE: JUN 1 1982
Ramsey Leathers, Clerk

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

For Publication
June 1, 1982

STATE OF TENNESSEE,

Plaintiff-Appellee,

vs.

RICHARD W. SIMON,

Defendant-Appellant.

Montgomery Criminal
C.C.A. No. 80-57-I
Hon. Sam E. Boaz, Judge

For Plaintiff-Appellee:

James A. Delanis
Assistant Attorney General

Of Counsel:

William M. Leech, Jr.
Attorney General

For Defendant-Appellant:

Robert W. Wedemeyer
Gerald W. Werksman
Clarksville, Tennessee

FILED
JUN 1 1982
RAMSEY LEATHERS
CLERK
SUPREME COURT

OPINION

AFFIRMED

HARBISON, C.J.

Appellant was convicted of first-degree murder committed during the perpetration of a robbery. He was sentenced to death. Some twenty-three issues have been presented for review in his appeal to this Court.

Despite the numerous issues urged on appeal, there is no challenge to the sufficiency of the convicting evidence. The testimony concerning the robbery and homicide is uncontradicted except for minor details and clearly establishes the guilt of appellant.

The crime occurred on the evening of Sunday, April 22, 1979, at about 11:30 p.m. Appellant and five other young men, two of them juveniles, had been riding around Clarksville and its vicinity since the early part of the evening. They had planned to rob another establishment but when they went to it no one responded. They then decided to rob the mobile home of Mr. and Mrs. Paul Burkhart, which served as their residence and also as an office for a trailer park which they operated. One of the juveniles in the group was a student in a high school attended by the daughter of Mr. and Mrs. Burkhart, and the daughter had told him that the Burkharts kept a large amount of cash in their mobile home.

The group went to the premises of the trailer park in two automobiles. The driver of one vehicle and a companion waited outside the park during the commission of the robbery. Appellant was riding in the other automobile driven by Malcolm Gray. They were accompanied by Larry Simpson and a juvenile named Everett Ogburn. Ogburn did not get out of the vehicle, but the other three went to the door of the Burkhart trailer and knocked. When Mr. Burkhart answered, they forced their way into the living room and demanded money. Appellant was

armed with a .38 caliber pistol and Gray with a shotgun. Gray and Simpson wore stocking masks, but appellant was not masked.

Mr. Burkhart told the intruders where a money box was kept in the den. Appellant and his companions went into the den, and at that point Mrs. Burkhart came down the hall of the trailer to the doorway of the den. Appellant grabbed her around the waist, wrestled her to the floor and put his gun to her neck. He then shot her through the neck, severing the jugular vein. She bled to death within a short time thereafter. Without attempting to assist her, appellant and his companions seized the money box and fled. The helpless bleeding victim attempted to use the telephone, but was unable to do so. Her husband and children called for help and attempted to staunch the flow of blood without success. The victim at no time offered any resistance to appellant, was unarmed, and weighed only about 110 pounds. The shooting was unprovoked, and no excuse has been offered for it, except that in a signed statement appellant indicated that the shooting was accidental and that he did not intend to harm the victim. Appellant did not take the stand in his defense at any stage of the lengthy trial.

Appellant and his companions divided the money, threw away the weapons they were carrying and made every effort to conceal their participation in the crime. Appellant left Clarksville the next day and flew to Chicago, where he was apprehended by the police several days later. He gave the police a statement strongly incriminating himself and admitting his participation in the robbery, although denying any intention to injure or kill the victim.

Mr. Burkhart identified appellant without hesitation. The vehicle in which appellant and his companions had arrived at the trailer was identified by the son and daughter of the deceased and by a witness who lived in a trailer across the street from the Burkhart home. The juvenile who had accompanied appellant and his companions, Everett Ogburn, testified at the trial and described the events of the evening. Thomas Mickens, who had driven the other vehicle and who was being held in jail on a murder charge in connection with this case, confirmed Ogburn's account of the activities of the evening and of the events prior to and after the robbery. The weapons used in the robbery were recovered. A firearms expert testified that the pistol used by appellant was not equipped with a hair trigger and that normal pressure was required to pull the trigger in order to fire it. Redacted statements from Gray and Simpson corroborated generally the testimony given by the other witnesses and the events summarized above although in their redacted form they did not directly identify appellant as the person who fired the pistol.

There can be no question from the record, therefore, that appellant killed an innocent and unresisting victim during the course of a planned, premeditated robbery. Whether the shooting was accidental or intentional was clearly a question for the jury. Material evidence supports their verdict that it was not accidental but was accomplished by appellant either intentionally or with complete recklessness and indifference to the fate of the victim.

After a lengthy trial, the jury found appellant guilty of murder in the first degree. Following a sentencing hearing they found that the homicide was committed during the

perpetration of a robbery and that there were no mitigating circumstances sufficient to outweigh this statutory aggravating circumstance. T.C.A. § 39-2404(i)(7). Accordingly they imposed the death penalty.

One of the issues presented for review is that mitigating circumstances outweighed the aggravating circumstance proved at the tiral. We find this issue to be without merit. The principal mitigating circumstances advanced during the sentencing hearing were appellant's youth, since he was only nineteen years of age on the date of the homicide, and the absence of any prior criminal convictions. The testimony showed, however, that he had been in trouble with the law on several occasions while a juvenile. He had completed a tour of military service at a base near Clarksville some time prior to the events involved here, and had returned to Clarksville to stay with friends.

In our opinion the mitigating circumstances did not outweigh the aggravating circumstance established by the State's proof, nor was the sentence of death disproportionate when all of the facts and circumstances are considered. The death penalty has been approved by this Court with review denied by the United States Supreme Court in at least two other cases, involving three defendants who committed murder during the perpetration of armed robberies. See Houston v. State, 593 S.W.2d 267 (Tenn. 1980), cert. denied, 449 U.S. 891 (1980); State v Dicks, 615 S.W.2d 126 (Tenn. 1981), cert. denied, ___ U.S. ___ , 102 S. Ct. 431 (1981); State v. Strouth, 620 S.W.2d 467 (Tenn. 1981), cert. denied, ___ U.S. ___ (1981). The facts and circumstances of neither of those cases were any more shocking, heartless or ruthless than those shown here,

where appellant and his companions deliberately planned the robbery, entered into a private home late at night, robbed the premises and shot to death a housewife and mother without the slightest provocation or excuse. Certainly we cannot say that the verdict of the jury was arbitrary, capricious, unwarranted or disproportionate to sentences previously approved in similar cases.

Many of the issues urged on appeal are without substance and require little discussion. The crime occurred on April 22, 1979. Appellant and his codefendants, Gray, Simpson and Mickens were indicted on May 22, 1979. The trial of Mickens was later severed from that of the other three. Appellant, Gray and Simpson were brought to trial jointly on March 24, 1980, approximately eleven months after the crime and about ten months after the indictment. In the interim there were numerous motions filed by appellant and his codefendants, and the case was continued once at their request. Appellant urges that the proceedings should be dismissed for lack of a speedy trial. We find this issue to be without merit. The elapsed time between indictment and trial was relatively short. It was fully explained in the record and no prejudice whatever to appellant based upon lapse of time has been suggested.

It is insisted that the trial court should have appointed additional counsel to represent appellant. He was the only one of the three codefendants to receive the death penalty, the other two being found guilty of murder in the first degree and sentenced to life imprisonment. The proof developed without contradiction, however, that appellant was the person who seized the victim and then shot her, without any apparent assistance from the codefendants; while this

does not legally minimize their guilt, certainly the jury was entitled to take into account the fact that appellant was the "trigger man" and to make a distinction between him and the codefendants.

For some time after the crime, however, it was not known which of the three defendants fired the shot. Different and conflicting stories were given to the police by witnesses during the course of the investigation. When the four original defendants were indicted, the trial court appointed counsel for all of them. Counsel appointed to represent appellant had been licensed to practice law for a little over two years prior to his appointment in the present case and had been practicing for just under three years when trial commenced. The record demonstrates, however, that he filed numerous pretrial motions on behalf of appellant and participated ably and competently in the trial. He has represented his client most ably in this appeal. On the present record we find that appellant has had the full and able assistance of competent counsel.

As a matter of practice, in our opinion, a trial judge should appoint more experienced counsel to represent persons against whom the death penalty is sought, particularly where there is only one defendant or where the identity of the accused most likely to receive the death penalty is known. In the present case, however, the trial judge may not have known at the time of the indictment which of the four accused persons fired the shot, and the attorney whom he appointed to represent appellant proved to be most able and diligent in the preparation and trial of this case, insofar as the present record reveals.

Equally without merit is the contention that the trial judge should have ordered the state to furnish a complete

trial transcript to counsel for appellant prior to his filing a motion for a new trial. There is no suggestion or indication that appellant or his counsel has been in any way impeded in the preparation of a post-trial motion or appeal. The motion for a new trial, as amended, contained forty-three grounds, and it seems to us that every conceivable issue which could be presented on behalf of appellant was raised both in the motion for new trial and in this appeal.

During the course of the trial two photographs of the victim were admitted into evidence. These were small black and white snapshots. These were not particularly inflammatory and did tend to illustrate the type of wound inflicted upon the victim and the position of her body when she was shot. In our opinion the trial judge did not abuse his discretion in admitting them into evidence. State v. Banks, 564 S.W.2d 947 (Tenn. 1978). Appellant insists that the Assistant Attorney General was guilty of improper argument in referring to himself as "The People's Attorney" or representative of "the people" and in making derogatory comments about the defendants. The trial judge sustained an objection to one derogatory comment, and we find that the other comments made by the prosecutor were within the bounds of propriety. The assignment is overruled.

Equally without merit is the contention that the trial judge erred in permitting the State to dismiss the first count of the indictment and to proceed against appellant and his codefendants only on a second count charging felony-murder. It developed that there was omitted from the first count certain language necessary to charge murder in the first degree under the common law, and for this reason the State requested

and was granted permission to dismiss that count. A similar issue was recently presented to this Court in the case of State v. Harrington, ___ S.W.2d ___ (Tenn. 1981)(released for publication at Nashville on December 28, 1981). For the reasons stated in that opinion we find this issue to be without merit. The dismissal of the first count could not have prejudiced appellant in his defense of the second count which clearly charged felony-murder.

In the Harrington case it was insisted that the defendant was denied an opportunity to present a claim of self-defense because the State dismissed the common law count. There is no suggestion of such a claim in the present case nor any other showing of prejudice to the defendant by the election of the State to proceed on the felony-murder count alone.

Appellant claims a violation of his right of confrontation in the admission of a redacted statement from his codefendant Malcolm Gray. As read to the jury, the redacted statement, referring to events after the homicide, contains the following:

> "While I was driving, there was a discussion, and it was said, 'Yeah, I shot the bitch.' 'What happened,' I said. 'But you shot her. You shot her.' I said, 'You didn't have to shoot her.'"

Counsel for appellant had suggested a somewhat different form of redaction of the original statement. The original quoted appellant as saying that he shot the victim and contained the laconic expression, "So what." The latter phrase does not appear in the form of the statement which was read to the jury.

While the form of redaction suggested by counsel

for appellant might have been preferable, we do not believe that reversible error was committed by permitting the version quoted above. Here there were interlocking confessions of all three persons on trial, and the confessions were read late in the proceedings after other irrefutable evidence had already been introduced that appellant fired the shot. We find no violation of Bruton v. United States, 391 U.S. 123 (1968), and even if there had been, under the circumstances shown in this record any error that might have resulted would have been harmless beyond a reasonable doubt.

Appellant insists that the trial judge erred in admitting into evidence a shotgun which had been carried by Malcolm Gray. The shotgun was found in a field near Gray's residence, where it had been thrown as appellant and his companions were returning from the Burkhart trailer. It is contended that the weapon was the fruit of an illegal search. The record indicates, however, that Gray consented to the search. Further, there is no indication that appellant had any interest either in the weapon or the premises searched so as to confer standing upon him to raise this issue. The assignment is overruled.

The trial court admitted into evidence the deposition of a witness, Eduardo Ortegon, who lived across the street from the Burkhart trailer on the date of the robbery. He had observed the arrival of the automobile in which appellant was riding, had observed the armed robbers forcing their way into the Burkhart residence, and had called the police. He was in military service, and it was necessary for him to leave the state prior to the date of the trial. The trial judge permitted the deposition to be taken in accordance with Rule 15,

Tennessee Rules of Criminal Procedure. We find no error in the procedure which was followed in the taking of the deposition or in its use at trial. The trial judge excluded that portion of the cross-examination of the witness taken by counsel for Mickens, the severed defendant, but appellant has not suggested that any prejudice to him occurred as a result of that decision. We find the issue to be without merit.

We find no abuse of discretion by the trial judge in permitting the State to cross-examine the juvenile witness, Everett Ogburn, after he had given testimony contrary to recorded statements which he had earlier made to the prosecutor. Equally without merit is the objection to a statement made by appellant to a local police officer, Marshall Ryan. The evidence both at the trial and at a pretrial motion to suppress established that the statement was voluntary. Further it consisted of nothing more than a demonstration by appellant of his contention that the shooting was accidental and it corroborated a former written statement given by appellant to police officers in Chicago. No prejudice to appellant could have resulted from the testimony of officer Ryan, particularly in view of testimony previously given in the case by Mr. Burkhart and other witnesses.

Appellant insists that the trial judge erroneously refused to instruct the jury upon the legal effect of their failure to reach agreement on the issue of punishment. Such instructions are specifically prohibited by statutes dealing with the death penalty. T.C.A. § 39-2404(h). A similar argument was considered and rejected by the Court in Houston v. State, 593 S.W.2d 267 (Tenn. 1980), cert. denied, 449 U.S. 891 (1980), and in State v. Pritchett, 621 S.W.2d 127 (Tenn. 1981).

We likewise find no error in the failure of the trial judge to charge certain lesrer included offenses urged by appellant. The trial judge did charge on the lesser included offenses of robbery, murder in the second degree, voluntary manslaughter, involuntary manslaughter, aiding and abetting, and conspiracy. Appellant insists that other lesser included offenses should have been included in the instructions, particularly those dealing with an attempt to commit certain offenses. The evidence clearly showed, however, that appellant was guilty of the greater offenses charged or nothing at all. The failure of the trial judge to charge on the requested offenses was therefore not prejudicial or reversible. See Johnson v. State, 531 S.W.2d 559 (Tenn. 1975).

After the guilt phase of the trial and during the sentencing hearing an anonymous note was found on the back of a legal pad in the jury room. The trial judge questioned the jurors concerning this note. He ascertained that none of them had any knowledge about it and that it would have no influence upon their decision. Under the circumstances we are of the opinion that the trial judge was not required to grant a mistrial and that the procedure which he followed was appropriate.

At the sentencing phase appellant offered testimony to the effect that the death penalty was not a deterrent to homicide. The trial judge deemed this testimony irrelevant and excluded it. We find no error in this regard. See State v. Johnson, ___ S.W.2d ___ (Tenn. 1982) (released at Nashville for publication on May 3, 1982).

Appellant insists that the trial judge committed error in conducting trial sessions into the late afternoon

and evenings, resulting in fatigue to counsel and to the jury. At no point, however, did the trial judge hold court beyond 9 p.m. and this on only three occasions. We find no abuse of his discretion. There is nothing in the record to document appellant's contention that his decision not to testify at any stage of the trial was affected by the length of the trial sessions.

There was considerable pre-trial publicity concerning this criminal episode, both at the time it occurred and shortly before the trial. Appellant and his codefendants were black, and there were demonstrations in the Clarksville area by civil rights groups, but these generally favored appellant and his codefendants, rather than the contrary. Counsel for appellant and for his codefendants moved for a change of venue, and this motion was seriously considered by the trial judge. Ultimately, however, he overruled the motion and we are unable to conclude that he abused his discretion or that the pre-trial publicity so tainted the jury venire as to preclude a fair trial in Montgomery County. The decision of the trial judge not to order a change of venue will be upheld absent a clear showing of abuse of discretion. Swain v. State, 219 Tenn. 145, 407 S.W.2d 452 (1966); Adams v. State, 563 S.W.2d 804 (Tenn. Crim. App. 1978). The same is true with respect to the granting of a continuance, which was sought by appellant and his codefendants shortly before the trial. The publicity surrounding the trial was extensive, but was neither inflammatory nor unfair. These assignments are overruled.

Appellant insists that counsel were not provided with a list of prospective jurors in compliance with Rule 24(g) Tennessee Rules of Criminal Procedure. It does appear, however,

that counsel were furnished with such a list on the first day of the trial. The trial court impaneled a special venire, and no prejudice to appellant has been demonstrated because the jury list was not available at an earlier date.

Appellant insists that the trial court erred in not permitting individual voir dire examination of the jurors. It appears, however, that the trial judge did permit counsel to examine prospective jurors individually concerning pre-trial publicity after the first two days of the voir dire examination.

The voir dire in this case consumed six full trial days, sometimes running into the evening. It comprises over fifteen hundred pages of transcript.

It was stated by this Court in Sommerville v. State, 521 S.W.2d 792, 797 (Tenn. 1975) that individual examination of prospective jurors should be permitted outside the presence of other chosen and prospective jurors when the venire have been exposed to potentially prejudicial material. Nevertheless the trial judge has wide discretion in the method followed, subject to the Rules of Criminal Procedure, and we are unable to find any abuse of discretion by the trial judge in the method which was employed in the present case. We also find without merit appellant's insistence that several jurors were held by the trial judge to be qualified when they should have been excluded for cause. The juror most objected to by counsel for appellant in his brief was ultimately excused by peremptory challenge and did not participate in the trial. As previously stated, the voir dire examination was extremely lengthy and voluminous, and counsel were allowed to ask wide-ranging questions of the prospective jurors. We find no reversible error in the rulings of the trial court either in declining

to discharge jurors for cause or in excluding certain jurors who stated unequivocally that they could not, under any circumstances, consider imposition of the death penalty. These assignments are overruled. There were several close questions presented in the examination of the jurors in this regard. This Court has not hesitated to set aside a death penalty when it felt that the trial judge had improperly disqualified jurors under the decision of the Supreme Court of the United States in Witherspoon v. Illinois, 391 U.S. 510 (1968) and its progeny. See State v. Harrington, ___ S.W.2d ___ (Tenn. 1981). We find no such violation here.

The single assignment made by appellant which has caused us most concern has to do with the interpretation given by the trial judge to Rule 24(c), Tennessee Rules of Criminal Procedure, governing the exercise of peremptory challenges. The interpretation given by the trial judge in this case is consistent with that approved by the Court of Criminal Appeals in several unreported cases,[1] but it is one with which we find ourselves in disagreement.

Rule 24(d) prescribes the number of peremptory challenges available to an accused and to the State in criminal cases. Insofar as pertinent here, Rule 24(d) provides:

> "If the offense charged is punishable by death, each defendant is entitled to fifteen peremptory challenges and the state is entitled to eight peremptory challenges for each defendant."

As applied to the trial here under consideration, the State would have been entitled to a total of twenty-four peremptory challenges and the defendants to a total of forty-five. Under rules prevailing prior to the adoption of the

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[1] State v. Sanchez (Tenn. Crim. App. May 28, 1980); State v. Gray (Tenn. Crim. App. Nov. 19, 1980); State v. Alexander (Tenn. Crim. App. July 7, 1981).

Rules of Criminal Procedure, peremptory challenges were usually exercised in open court and in the presence of the prospective jurors. If more than one defendant was on trial in a criminal case, the exercise of a peremptory challenge by one defendant excluded the juror as to all. Hill v. State, 10 Tenn. 246 (1829). By collaborating with each other, counsel for codefendants could thus assure that each defendant independently received the maximum number of peremptories to which he was entitled. Whether such collaboration would occur in a given case, of course, was a matter of strategy to be determined by the participating attorneys.

Trial lawyers have long been sensitive to the delicate problems presented when peremptory challenges are exercised in open court and in the hearing of jurors already tentatively accepted and other prospective jurors who may be in the courtroom. The Rules of Civil Procedure and related statutes are silent as to the method of exercising peremptory challenges, and the procedure is generally left to the discretion of the trial judge. T.R.C.P. 47; T.C.A. § 22-3-105. The importance attached by the trial bar to the voir dire examination and the right of counsel to participate therein, however, is illustrated by T.C.A. § 22-3-101, enacted in 1977, as follows:

> "Parties in civil and criminal cases or their attorneys shall have an absolute right to examine prospective jurors in such cases, notwithstanding any rule of procedure or practice of court to the contrary."

When the Rules of Criminal Procedure were formulated, the Advisory Committee recommended, and this Court adopted, a method of exercising peremptory challenges in criminal cases

which was designed to protect the confidentiality of the process and to avoid embarrassment of counsel or their clients. Rule 24(c), Tennessee Rules of Criminal Procedure, provides as follows:

> "After twelve prospective jurors have been passed for cause, counsel will submit simultaneously and in writing, to the trial judge, the name of any juror either counsel elects to challenge peremptorily. Upon each submission each counsel shall submit either his challenge or a blank sheet of paper. Neither party shall make known the fact that he has not challenged. Replacement jurors will then be examined for cause, and, after passed, counsel will again submit simultaneously, and in writing, to the trial judge the name of any juror counsel elects to challenge peremptorily. This procedure will be followed until a full jury has been selected and accepted by counsel. Peremptory challenges may be directed to any member of the jury, and counsel shall not be limited to replacement jurors. Alternate jurors will be selected in the same manner. The trial judge will keep a list of those challenged and, if the same juror is challenged by both parties, each will be charged with the challenge. The trial judge shall not disclose to any juror the identity of the party challenging him."

This method was already in use in a number of the state and federal trial courts when the rule was adopted. It was followed by the trial judge in the present case. Unfortunately, however, in its drafting, the rule contemplated the trial of a single defendant. It is silent on the method to be used when several defendants are on trial, although the immediately following section guarantees that "each" defendant shall be entitled to a specified number of peremptory challenges.

It was not the intention of the Advisory Committee or of this Court to reduce the number of peremptory challenges available to the State or to either party, except as this might be made inevitable when both the State and the accused challenged the same individual.

In the present case and in the unreported opinions of the Court of Criminal Appeals alluded to previously, counsel for codefendants sought to collaborate or confer with each other in the exercise of peremptory challenges, so as not to duplicate their challenges and thereby, to that extent, reduce the effective number of peremptory challenges available to each. The trial judge expressly prohibited such conference among counsel and instructed them to exercise their peremptory challenges independently of each other and without any sort of consultation.

In this regard, we are of the opinion that the trial judge was in error and that the Court of Criminal Appeals has erred in the past in so interpreting Rule 24(c). It does not prohibit such consultation among counsel, nor is there any indication that it was so intended. It is true that a committee comment to the rule stressed the importance of confidentiality. It states:

> "The procedure for exercising peremptory challenges in writing is new and is designed to insulate parties and counsel from the public exercise of a peremptory challenge. Counsel will be expected to honor the spirit of the rule and to maintain the privacy of their respective peremptory challenges.

The latter sentence, in our opinion, refers to counsel not making any sort of remark or giving any indication to seated or prospective jurors as to the source of a challenge. It does not prohibit counsel from conferring among themselves and agreeing upon the "strikes" they will employ. In our opinion Rule 24(c) should be read so as to permit counsel to confer concerning the exercise of their peremptory challenges, when more than one defendant is on trial, but otherwise the procedure followed shall be that stated in the rule. No counsel should

give any indication as to the source of a peremptory challenge, and all should be required to hand to the trial judge written statements, showing the juror challenged or indicating that no challenge is being made at that time by a particualr attorney. We do not believe that there was any intention, in the promulgation of this rule, to change prior practice with respect to the number of peremptory challenges available, or to impose any limitation upon Rule 24(d) which assures to "each" defendant a specified number of effective peremptory challenges. Only where there is a duplication should more than one defendant be charged with a particular challenge, and such duplications may be minimized or eliminated by consultation among counsel for codefendants if desired.

While we are convinced that this is the proper interpretation of the rule and is the practice which should be followed, the question arises as to whether deviation from it constituted reversible error in the present case. There were some duplications among counsel for codefendants in their peremptory challenges by reason of the directions given by the trial judge prohibiting consultation. Near the end of the voir dire examination of all of the jurors, counsel for appellant exhausted his last peremptory challenge. He thereafter indicated that he would have challenged another juror peremptorily had he been given the opportunity to do so. Neither this juror nor any other juror thereafter impaneled was legally disqualified or incompetent to serve.

We have already indicated that the voir dire examination in this case was massive in scope. The trial judge went to great lengths to assure that a fair and impartial

jury was impaneled, and we are of the opinion that any error committed in the control of peremptory challenges in this case was harmless beyond a reasonable doubt and does not require reversal of the conviction. The situation presented here is not without precedent in this state, even in death cases. As important as the voir dire examination and the proper exercise of peremptory challenges undoubtedly are, these procedures are designed to insure the selection of a fair and impartial jury, not to enable the accused himself to select particular jurors. Where those who actually serve are not shown to be legally incompetent or otherwise disqualified for cause, errors in the procedures regarding peremptory challenges have usually been deemed harmless and not to require retrial of a case.

Probably the leading case in this jurisdiction is Mahon v. State, 127 Tenn. 535, 156 S.W. 458 (1912). In that case counsel for the accused challenged two jurors for cause, but his challenges were overruled. He then exercised peremptory challenges on these two jurors, so that by the time the twelfth juror was seated the accused had exhausted all of his peremptory challenges. He nevertheless sought to challenge the twelfth juror, and this challenge was overruled because there were no challenges left.

The Supreme Court in reviewing the case determined that the trial judge had ruled erroneously on the first two jurors and that they should have been excluded for cause. In effect, therefore, the accused had erroneously been deprived of two peremptory challenges, and had the trial judge ruled correctly, the accused would have been able to remove the twelfth juror by the exercise of one of these challenges.

This Court found that the trial court was in error in wrongfully denying to the accused one or more peremptory challenges. Nevertheless, the Court cited the recently enacted harmless error statute, 1911 Tenn. Pub. Acts, ch. 32. In light of its provisions, it held that the error was harmless and not reversible, since the twelfth juror seated was shown to have been legally competent and the entire panel as finally constituted was composed of fair and impartial jurors. The Court said:

> "The constitution of this State guarantees to the accused a fair and impartial trial, which necessarily includes a trial before a fair and impartial jury. The constitution does not secure to him the right to challenge proposed jurors peremptorily. This is a privilege only granted to the accused as a matter of free grace by the legislature. It does secure him the right to challenge for any cause which renders the jury partial, because it is only in this way that its guaranty of a fair and impartial trial can be secured to him in the practical administration of justice. The right of peremptory challenge, which means the right to stand aside a proposed juror without any assigned cause other than the mere objection of the accused, is a right that can be regulated by statute. As was well said in Wooten v. State, supra, [99 Tenn. 189, 41 S.W. 813 (1897)], 'The right to challenge is a right to reject, not to select a jury. If from those who remain an impartial jury is obtained, the constitutional right of the accused is maintained.' Chapter 32 of the Acts of 1911, supra, can and does regulate the procedure of this court in so far as it does not infringe upon the constitutional right of a fair and impartial trial. As the legislature gave to the accused the right to challenge peremptorily, it may take it away; and by the same reasoning, it may regulate and limit the power of this Court in granting new trials for a refusal of the trial judge to allow such challenges. As applied to this case, the statute referred to merely says in effect that, although the accused may be deprived of the statutory number of peremptory challenges, yet, unless it appear that he was denied a trial by a fair and impartial jury, no new trial shall be had. . . .
>
> "It is not within the power of the legislature to infringe upon the constitutional guaranty of a fair and impartial trial before a fair and

impartial jury, but there is no insistence in this case that the trial jury was not unobjectionable in every legal sense. The complaint is that plaintiff in error was denied certain peremptory challenges, and in that way he was compelled to accept upon the jury one juror who was objectionable to him for some reason not assigned, but who was admittedly competent and qualified under the law. Construed in this way, and as regulating the procedure of this court to this extent, chapter 32, Acts of 1911, is not obnoxious to any provision of the constitution, and does no violence to any constitutional right of the accused." 127 Tenn. at 546-548.

This case has been cited and followed on numerous occasions. In Manning v. State, 155 Tenn. 266, 292 S.W. 451 (1927), a jury had been seated and the trial had proceeded until all of the evidence was introduced. Thereafter one of the jurors improperly separated from the others, escaped custody of the jury officer and remained at large for three days. When brought back into custody, he was punished for contempt and dismissed from the jury. Counsel for the accused then moved for a mistrial, but this motion was overruled. The trial judge then proceeded to impanel a replacement juror. Counsel for the accused insisted upon the right to use peremptory challenges not only for the additional juror but for the entire panel. The trial judge, however, limited the accused to one remaining unexhausted peremptory challenge which he had from the initial impaneling of the jury. He exhausted that challenge and thereafter sought unsuccessfully to exercise additional peremptory challenges. Upon appeal this Court affirmed the procedure employed by the trial judge. The Court said:

"In Mahon v. State, 127 Tenn. 535, it is said that the Constitution guarantees the accused a fair and impartial trial which necessarily includes a trial before a fair and impartial jury. But the constitution does not secure the accused the right to challenge proposed jurors, for that is a right which may be taken away by the legislature. At common law thirty-five challenges,

one short of three juries were allowed the accused, but if he challenged a greater number the law pronounced death upon him, if on trial for treason, and for lesser felony subjected him to piene fort et dure, or mercifully hanged him. The right of challenge has been reduced in this State to fifteen, but without bringing forward the unreasonable practices of the common law attendant upon an improvident use of challenges.

"Here the accused was given the right to exercise fifteen peremptory challenges, and the right to challenge for cause in selecting the original twelve jurors. During the progress of the trial one of the original jurors was guilty of such conduct as would have vitiated the verdict had he participated in it, and the trial judge of necessity dismissed him. The vacancy was supplied and the accused was allowed to use the remaining challenges in finally making the jury which tried the cause. The witnesses were re-examined and the cause was heard by twelve jurors." 155 Tenn. at 275-276.

The Court held that since all of the jurors who were finally impaneled were impartial and not shown to be disqualified for cause, no error requiring reversal had occurred.

In Kirkendoll v. State, 198 Tenn. 497, 281 S.W.2d 243 (1955), a case in which the death penalty was upheld, the trial judge erroneously denied counsel for the accused the right to exercise a peremptory challenge as to a juror who had been unsuccessfully challenged for cause. The juror had been accepted by both parties, but apparently had not been sworn. The Court said:

"We have very recently held that a peremptory challenge of a juror may be made at any time before the jury is sworn. Estep v. State, 193 Tenn. 222, 245 S.W.(2d) 623, 625. It is equally well settled, though, that the erroneous denial of a peremptory challenge is not ground for reversal if the jury is composed of unbiased and unprejudiced jurors." 198 Tenn. at 508-509.

Cited in support of this holding was the case of Mahon v. State, supra, and Long v. State, 187 Tenn. 139, 213 S.W.2d 37 (1948). Because the Court found that the juror unsuccessfully challenged was legally qualified, it declined to reverse the conviction or to set aside the death penalty.

In one of the cases just cited, Long v. State, supra, it was alleged that the trial court had erroneously overruled a challenge for cause and forced the defendant to exhaust one of his peremptory challenges. He was thereafter unable to challenge peremptorily a twelfth juror whom he would otherwise have excluded from the jury. Again, because the juror was found to have been legally qualified, any error was found to be harmless.[2]

In light of these cases, in our opinion the fact that the trial judge erroneously prohibited counsel for the codefendants from consulting and thereby may have caused premature exhaustion of appellant's peremptory challenges does not require reversal since no juror who was actually seated is shown to have been legally disqualified, biased or prejudiced. The assignment is overruled. In the future, however, we are of the opinion that trial judges should permit cooperation and collaboration among counsel for codefendants so long as this is conducted in such manner that the identity of a party exercising a peremptory challenge, whether this be one of the codefendants or the State, shall not be disclosed to other seated or prospective jurors.

All assignments of error are overruled and the judgment of the trial court is affirmed. The sentence

[2]See also State v. Wingard, 480 S.W.2d 915 (Tenn. 1972) (excessive peremptories allowed to State held harmless error); Nelson v. State, 200 Tenn. 462, 292 S.W.2d 727 (1956), cert. denied, 355 U.S. 327 (1957) (same); England v. State, 196 Tenn. 186, 264 S.W.2d 815 (1954) (juror peremptorily challenged but inadvertently re-seated)

will be carried out as provided by law on August 31, 1982, unless otherwise ordered by this Court or by other proper authority. Costs are taxed to appellant.

Justice Brock concurs in the foregoing opinion except for the imposition of the death penalty. He dissents in that regard for reasons stated in his dissenting opinion in State v. Dicks, 615 S.W.2d 126, 132 (Tenn. 1981).

William J. Harbison

William J. Harbison, C.J.

Fones, Cooper and Drowota, JJ., concur;
Brock, J., partial dissent.

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

June 28, 1982

STATE OF TENNESSEE,
Plaintiff-Appellee,
vs.
RICHARD W. SIMON,
Defendant-Appellant.

Montgomery Criminal
CCA NO. 80-57-I

FILED
JUN 28 1982
RAMSEY LEATHERS
CLERK
SUPREME COURT

ORDER ON PETITION TO REHEAR

A petition for rehearing has been filed on behalf of appellant. After consideration of the same, the Court is of the opinion that the petition is not well taken and it is accordingly overruled at the cost of appellant.

Enter this 28th day of June, 1982.

PER CURIAM

39-[illegible]02. Murder in the first degree — [illegible]ss X felony. — (a) Every murder perpetrated by means of poison, lying in wait, or by other kind of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any murder in the first degree, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb, is murder in the first degree.

(b) A person convicted of murder in the first degree shall be punished by death or by imprisonment for life.

(c) Murder in the first degree is a Class X felony. [Code 1858, § 4598 (deriv. Acts 1829, ch. 23, § 3); Shan., § 6439; mod. Code 1932, § 10768; Acts 1974 (Adj. S.), ch. 462, § 1; 1977, ch. 51, § 1; 1979, ch. 318, § 4.]

39-2404. Punishment for murder in first degree — Sentencing proceeding — New trial. — (a) Upon a trial for murder in the first degree, should the jury find the defendant guilty of murder in the first degree, they shall not fix punishment as part of their verdict, but the jury shall fix the punishment in a separate sentencing hearing to determine whether the defendant shall be sentenced to death or life imprisonment. The separate sentencing hearing shall be conducted as soon as practicable before the same jury that determined guilt, subject to the provisions of subsection (k) relating to certain retrials on punishment.

(b) In the sentencing proceeding, the attorney for the state shall be allowed to make an opening statement to the jury and then the attorney for the defendant shall also be allowed such statement, provided that the waiver of opening statement by one party shall not preclude the opening statement by the other party.

(c) In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated in subsection (i) below; and any evidence tending to establish or rebut any mitigating factors. Any such evidence which the court deems to have probative value on the issue of punishment may be received regardless of its admissibility under the rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the state of Tennessee.

(d) In the sentencing proceeding, the state shall be allowed to make a closing argument to the jury; and then the attorney for the defendant shall also be allowed such argument, with the state having the right of closing.

(e) After closing arguments in the sentencing hearing, the trial judge shall include in his instructions for the jury to weigh and consider any mitigating circumstances and any of the statutory aggravating circumstances set forth in subsection (i) of this section which may be raised by the evidence at either the guilt or sentencing hearing, or both. These instructions and the manner of arriving at a sentence shall be given in the oral charge and in writing to the jury for its deliberations.

(f) If the jury unanimously determines that no statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, or if the jury unanimously determines that a statutory aggravating circumstance or circumstances have been proved by the state beyond a reasonable doubt but that said circumstance or circumstances are outweighed by one or more mitigating circumstances, the sentence shall be life imprisonment. The jury shall then return its verdict to the judge upon a form provided by the court which may appear substantially as follows:

PUNISHMENT OF LIFE IMPRISONMENT

(1) We, the jury, unanimously find that the punishment shall be life imprisonment.

/s/_____
Jury Foreman

/s/_____
Juror

/s/_____
Juror

/s/_____
Juror

/s/_____
Juror

/s/_____
Juror

/s/_____
Juror

/s/_____
Juror

/s/_____ Juror

/s/_____ Juror

/s/_____ Juror

/s/_____ Juror

(g) If the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, and said circumstance or circumstances are not outweighed by any mitigating circumstances, the sentence shall be death. If the death penalty is the sentence of the jury, the jury shall (1) reduce to writing the statutory aggravating circumstance or statutory aggravating circumstances so found and (2) signify that there were no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so found. These findings and verdict shall be returned to the judge upon a form provided by the court which may appear substantially as follows:

PUNISHMENT OF DEATH

(1) We, the jury, unanimously find the following listed statutory aggravating circumstance or circumstances:

[Here list the statutory aggravating circumstance or circumstances so found]

(2) We, the jury, unanimously find that there are no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so listed above.

(3) Therefore, we, the jury, unanimously find that the punishment shall be death.

/s/_____ Jury Foreman

/s/_____ Juror

/s/_____ Juror

/s/_____ Juror

/s/_____ Juror

/s/_____ Juror

/s/_____ Juror

/s/_____ Juror

/s/_____ Juror

/s/_____ Juror

/s/_____ Juror

(h) If the jury cannot ultimately agree as to punishment, the judge shall dismiss the jury and the judge shall impose a sentence of life imprisonment. The judge shall not instruct the jury, nor shall the attorneys be permitted to comment at any time to the jury, on the effect of the jury's failure to agree on a punishment.

(i) No death penalty shall be imposed but upon a unanimous finding, as heretofore indicated, of the existence of one or more of the statutory aggravating circumstances, which shall be limited to the following:

(1) The murder was committed against a person less than twelve years of age and the defendant was eighteen years of age, or older.

(2) The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person.

(3) The defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder.

(4) The defendant committed the murder for remuneration or the promise of remuneration, or employed another to commit the murder for remuneration or the promise of remuneration.

(5) The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.

(6) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another.

(7) The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb.

(8) The murder was committed by the defendant while he was in lawful custody or in a place of lawful confinement or during his escape from lawful custody or from a place of lawful confinement.

(9) The murder was committed against any peace officer, corrections official, corrections employee or fireman, who was engaged in the performance of his duties, and the defendant knew or reasonably should have known that such victim was a peace officer, corrections official, corrections employee or fireman, engaged in the performance of his duties.

(10) The murder was committed against any present or former judge, district attorney general or state attorney general, assistant district attorney general or assistant state attorney general due to or because of the exercise of his official duty or status and the defendant knew that the victim occupied said office.

(11) The murder was committed against a national, state, or local popularly elected official, due to or because of the official's lawful duties or status, and the defendant knew that the victim was such an official.

(12) The defendant committed "mass murder" which is defined as the murder of three or more persons within the state of Tennessee within a period of forty-eight (48) months, and perpetrated in a similar fashion in a common scheme or plan.

(j) In arriving at the punishment the jury shall consider, as heretofore indicated, any mitigating circumstances which shall include, but not be limited to the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The murder was committed under circumstances which the defendant reasonably believed to provide a moral justification for his conduct;

(5) The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor;

(6) The defendant acted under extreme duress or under the substantial domination of another person;

(7) The youth or advanced age of the defendant at the time of the crime;

(8) The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment.

(k) Upon motion for a new trial, after a conviction of first degree murder, if the court finds error in the trial determining guilt, a new trial on both guilt and sentencing shall be held, but if the court finds error alone in the trial determining punishment, a new trial on the issue of punishment alone shall be held by a new jury empanelled for said purpose. In the event that the trial court, or any other court with jurisdiction to do so, orders that a defendant convicted of first degree murder (whether the sentence is death or life imprisonment) be granted a new trial, either as to guilt or punishment or both, said new trial shall include the possible punishments of death or life imprisonment. [Code 1858, § 4600 (deriv. Acts 1829, ch. 23, § 3); Shan., § 6441; Code 1932, § 10770; Acts 1977, ch. 51, § 2; 1981, ch. 33, § 1.]